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No.

In the Supreme Court of the United States

October Term, 1982

FESSLER, JOSEPH A., FESSLER, ANN, His Wife,
Petitioners

vs.

REDEVELOPMENT AUTHORITY, CITY OF WILKES-BARRE, PA.; KEYSTATE BAKERY; ZATCOFF, INC., Wood Street, Wilkes-Barre, Pa.; DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Philadelphia, Pa.; SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, WASHINGTON, D.C.

BRIEF FOR RESPONDENT, REDEVELOPMENT AUTHORITY, CITY OF WILKES-BARRE, PA. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Whether or not the Supreme Court should grant Petitioners' Petition for Writ of Certiorari.

Whether or not the Federal Court lacked jurisdiction over the subject matter of the controversy.

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COUNTER-STATEMENT OF THE CASE

Petitioner, Appellant below, on February 8, 1980 filed a complaint, pro se, against the Redevelopment Authority of the City of Wilkes-Barre, Pennsylvania, Department of Housing and Urban Development, the Secretary of HUD and Keystate Bakery, Zatcoff, Inc.

The complaint was headed by Petitioners as follows:

> "Appeal and review of all phases of relocation payment under the Federal, State, Eminent Domain Laws. Review of all appraisal also payment of legal fees. Seeking damages by Court. Complaints review and seeking M & E Damages."

An answer to said complaint was filed by the Respondent, Defendant Authority, on March 11, 1980.

On February 29, 1980, Defendant Keystate Bakery filed a motion to dismiss, said motion being granted by the Court on June 16, 1980. No appeal was filed by the Petitioners herein.

On April 28, 1980, Defendants, Department of Housing and Urban Development and Secretary of Housing and Urban Development, filed a motion to dismiss, said motion being granted on July 29, 1980. No appeal was filed by the Petitioners herein.

On November 14, 1980, Defendant, Redevelopment Authority of the City of Wilkes-Barre, Respondent herein, filed a motion for summary judgment and supporting brief.

Counter-Statement of the Case

On November 20, 1980, the Court granted said motion and dismissed Petitioners' complaint determining that it lacked jurisdiction of the subject matter of the controversy.

On December 19, 1980, Petitioners filed an appeal from said determination to the U. S. Court of Appeals for the Third Circuit. On April 5, 1982, said Court affirmed the judgment of the District Court, stating that:

> "There is no diversity of citizenship and no claim pleaded arising under the constitution or laws of the United States."

On July 3, 1982, the Petitioner, Appellant below, petitioned this Honorable Court for a Writ of Certiorari, said petition which is now before the Court for resolution.

COUNTER-STATEMENT OF THE FACTS

Petitioners, Appellants below, alleged damages in excess of $2,000,000.00 resulting from declarations of taking filed against their properties pursuant to the Eminent Domain Code of the Commonwealth of Pennsylvania, 26 P.S. 1-101.

The properties at issue, and the dates upon which the declarations of taking were filed in the Court of Common Pleas of Luzerne County, are as follows:

July 31, 1973—289-291 East Market Street, 16 South Grant Street, filed to No. 5555 of 1973.

July 31, 1973—312-314 East Market Street, filed to Nos. 5552 of 1973.

October 13, 1975—214 East Market Street, filed to No. 9543 of 1975.

After separate hearings before Boards of View, and upon appeals filed by the Petitioners herein from the Board of View awards, each of the above matters proceeded to trial before the Court of Common Pleas of Luzerne County.

The Petitioners were present, and represented by counsel of their choice during each of the aforementioned proceedings.

As a result of the aforesaid proceedings, verdicts were entered as follows:

No. 5555 of 1973—Verdict in the amount of $63,000.00 rendered on March 13, 1974.

No. 5552 of 1973—Verdict in the amount of $35,000.00 rendered on September 30, 1975.

No. 9543 of 1975—Verdict in the amount of $57,000.00 rendered on February 9, 1978.

Copies of the aforesaid verdicts are attached to Respondent's answer as Exhibits A, B, and C.

Petitioners' claim for business dislocation damages was denied by the Respondent Authority on September 30, 1975 and by the Department of Housing and Urban Development on January 15, 1976. As to all other eligible relocation benefits, Petitioners secured the maximum allowable relocation benefits under the Eminent Domain Code and the Uniform Relocation Act. Full payment was rendered on March 1, 1974 and a general release was executed, for all relocation claims, on that date. A copy of correspondence, the checks in full payment and the exceuted release are attached to Respondent Authority's answer as Exhibit D.

ARGUMENT

Rule 17, U. S. Supreme Court Rules, states:

> "1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's decision, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Argument

2. The same general consideration outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari."

Contrary to the foregoing rule, it is the Respondents' position that the Petitioners have neither stated special or important reasons for the grant of their petition, nor presented reasons of the character indicated by Rule 17.

Such being the case, it is respectfully submitted that the Petition for Writ of Certiorari in this matter should not be granted.

Moreover, the decision of the Court below was correct. The Federal Court lacked jurisdiction over the subject matter of the subject controversy since:

(1) Petitioners' complaint failed to allege any basis for Federal Court jurisdiction.

(2) Petitioners' complaint failed to allege any facts sufficient to provide a basis for Federal Court jurisdiction.

(3) Petitioners' complaint was barred by the doctrine of res judicata.

Initially, it is the Respondents' position that the Federal Court lacked jurisdiction since Petitioners' complaint failed to comply with Rule 8 (a) (1), Federal Rules of Civil Procedure. Said rule states:

"(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall

contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction, and the claim needs no new grounds of jurisdiction to support it, . . ."

The Court in the instant controversy did not have jurisdiction and the Petitioners' complaint did not, in violation of Rule 8(a) (1), contain any allegation of jurisdiction. Such being the case, for this reason alone, Petitioners' case warranted dismissal.

The federal cases addressing this issue are in accord with the foregoing position. Federal jurisdiction must affirmatively appear on the face of the complaint and the failure to present facts consistent with federal jurisdiction is violative of Rule 8(a) (1), Federal Rules of Civil Procedure. *Chasis v. Progress Mfg. Co.*, 382 F.2d 773 (3rd Cir. 1967); *Smith v. Spencer*, 477 F.2d 1150 (C.A. N.J. 1973); *Gorham v. Edwards*, 160 F. Supp. 928 (D.C. N.Y. 1958).

Moreover, the fact that the Petitioners filed pro se should not lessen the standard to be applied. Even pro se complaints have been found to be fatally defective due to a failure to state a basis for federal jurisdiction, *Boyer v. State of Wisconsin*, 345 F. Supp. 564 (D.C. Wisc. 1972).

Secondly, it is Respondents' contention that, even if the Petitioners had complied with Rule 8(a) (1), the Federal Court lacked jurisdiction because the facts upon which the complaint was based failed to provide a basis for jurisdiction. The only possible federal claim indicated involved an action for the deprivation of property without due process of law. In order to make such a claim Petitioners must, of course, allege a denial of a right s.

cured by the Constitution or laws of the United States. *Basista v. Weir*, 340 F.2d 74 (3rd. Cir. 1965). The Petitioners failed to either allege, or substantiate, such a denial. Moreover, all of the rights of which Petitioners alleged they have been deprived are fully protected by the Constitution of the Commonwealth of Pennsylvania at Article 1, Section 10, which provides:

> ". . . private property shall not be taken or applied to public use, without authority of law and without just compensation being first made or secured."

Additionally, under the Eminent Domain Code of 1964, 26 P.S. 1-101 et seq., the Commonwealth has established a procedure which fully protects the rights of the owner and guarantees him the constitutional safeguards to which he is entitled. *Valley Forge Golf Club v. Upper Merion Twp.*, 422 Pa. 227, 211 A.2d 292 (1966); *KOA v. Red Leon Municipal Authority*, 381 F. Supp. 1163 (M.D. Pa. 1974).

It has been held in the Third Circuit that the Pennsylvania Constitution and the Eminent Domain Code fully preserve all the constitutional rights due to the Petitioners with respect to the taking of their property. *Elterich v. City of Sea Isle City*, 477 F.2d 289 (3rd Cir. 1973).

As evidenced by the counter-statement of facts, aforesaid, and the verdicts and release attached as Exhibits A, B, C and D to the motion for summary judgment, the Petitioners were fully protected by, and proceeded in accordance with, the Constitution and Eminent Domain Code. Adjudication of the claims herein presented would constitute an unwarranted intrusion into the jurisdiction

of the State Courts, *KOA supra; Elterich, supra; Kadish v. City of Williamsport,* 362 F. Supp. 1343 (M.D. Pa. 1973), particularly where the claims have been adjudicated by the State Courts.

The constitutional rights of the Petitioners having been fully preserved under State law, and the Petitioners having proceeded in accordance with that law, the Petitioners cannot now allege a deprivation of those rights in Federal Court.

Petitioner's statement that he is attempting to proceed under 42 U.S.C. 1983, not specifically raised below, is equally without merit, since the Respondent is not a "person", and is therefore not a proper party under 42 U.S.C. 1983.

Finally, it is submitted that the Federal Court lacked jurisdiction since the verdicts previously entered in this matter, as indicated in the counter-statement of facts and the exhibits attached to the motion for summary judgment, are res judicata to Petitioners' claims. The issues being the same and having been previously judicially considered, the Petitioners cannot be heard to complain that they are now dissatisfied with the results of the previous litigation or that they failed to pursue some available claim. Such is particularly the case when Petitioners were represented throughout the prior proceedings by counsel of their choice. *Heiser v. Woodruff,* 327 U.S. 726 (1946); *Anselmo v. Hardin,* 253 F.2d 165 (3rd Cir. 1958).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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